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# INTERNATIONAL JUDICIAL LAW-MAKING

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## I. INTRODUCTION

The role of judicial institutions in the development of international law has been open question since the days of the Permanent Court of International Justice. Already in 1934, Hersch Lauterpacht had advanced the claim that ‘judicial law-making is a permanent feature of the administration of justice in every society’.<sup>1</sup> In many respects, if the adjective ‘judicial’ can be used as pertaining to a court of law or a system of courts of law that are dedicated to the administration of justice within a legal order,<sup>2</sup> understanding a judiciary’s role in law-making remains a foundational question as to the nature and form of a legal system.

The sheer number of international judicial institutions, each with their specific mandate, renders any sweeping commentary on the phenomenon of international judicial law-making rather illusory in this brief treatment of the question. Instead, a few ideas will be highlighted, so as to test whether any generalisations can be made about international judicial law-making. The question is not merely theoretical, but a matter of the actual practice of international judicial institutions. As such, the first section will consider the question of judicial law-making at the international level in the abstract. The second part of this study will consider how the jurisprudence of the International Court of Justice and its predecessor, the the Permanent Court of International Justice, have contributed to the development of international law. As the first permanent international court, its structure has usually been the

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<sup>1</sup> H Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (Longmans, London 1934), 45.

<sup>2</sup> Cf. HLA Hart, in *The Concept of Law*, 2<sup>nd</sup> edn (Clarendon, Oxford 1994), 132, who describes these courts as ‘rule-making authorities’ within a legal system.

archetype against which other international judicial institutions have been designed, and its body of case law stretching over nearly a century allows for clear observations as to its contributions to the process of international law-making. In the third part, a brief survey of judicial law-making will review the work of the WTO's Appellate Body, the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda, and the American and European human rights courts.

## II. INTERNATIONAL JUDICIAL LAW-MAKING

*It is an incontrovertible fact that a decision choosing one of two or more alternative courses equally available to the judge has an impact upon the understanding of the law in the future, whether by the judge, the lawyer or, indeed, by the public. Especially if it is an important or path-finding decision, the living law is not the same thereafter. The judge has become the instrument of change through which the process of adaptation takes place to the needs of the time. Decisions piled upon decisions thus make a whole corpus of law, whether or not the process be prohibited by state authority or settled tradition.*<sup>3</sup>

Although it is surely premature to suggest that international law has developed a robust international judicial function,<sup>4</sup> it is safe to admit that law-making is an intrinsic element of adjudication,<sup>5</sup> at least conceptually, in so far as clarifying ambiguities, filling perceived gaps, and safeguarding the coherence of a system is concerned. Some would go further: Lauterpacht emphasised the right (if not outright duty) of the international judge to develop the law,<sup>6</sup> and foresaw that a judgment in which this occurred need not be within the exercise of purely subjective discretion, but rather, be described as 'fulfilling what the legislator would have intended if he could have foreseen the changes occurring in the life of the

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<sup>3</sup> CG Weeramantry, 'The Function of the International Court of Justice in the Development of International Law', (1997) 10 *Leiden Journal of International Law* 309, 313.

<sup>4</sup> But *cf.* Y Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', (2009) 20 *European Journal of International Law* 73, 74.

<sup>5</sup> A von Bogdandy and I Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking', (2011) 12(5) *German Law Journal* 1341, 1345.

<sup>6</sup> In Lauterpacht, *supra* note 1, 8, he succinctly described the lawmaking function of the Court as 'the creation, development and clarification of an imposing body of rules of international law of varying degrees of crystallisation.'

community.<sup>7</sup> As such, because the basic principle of providing a reasoned judgment is a necessary precondition to the use of judicial pronouncements as a source of law,<sup>8</sup> these reasoned judgments become authoritative through the use of a consistent process and method.<sup>9</sup> If seen as vested with the appropriate authority, courts can clarify the content of unwritten law, whether custom or general principle, through its concrete application to a given legal dispute or situation; they can clarify ambiguities in the interpretation of a legal text; they can provide systematisation to a question of law where there might be conflicting practice or ambiguity.

Moreover, the interpretation of a principle or rule by a judicial body channels it into a concrete form, and ‘bestows it with meaning and authoritative weight.’<sup>10</sup> Courts and tribunals enjoy peculiar advantages due to their formal structure: they are provided with details of particular disputes submitted to them; judges are appointed to their benches for having the requisite legal expertise to do so; they follow a procedure specified in advance; and they are above all ‘required to fashion a just result which is in consonance with the infinite variations of fact that can exist in the application of a particular principle’.<sup>11</sup> In this respect, adjudicative reasoning shapes the method of discourse, outlining the contours of what is admissible and inviting participants in the legal process to adopt its own processes and methods. Accordingly, making law in a series of continuous small-scale decisions, built around a

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<sup>7</sup> H Lauterpacht, *The Development of International Law by the International Court* (Stevens and Sons, London 1958), 21, 80.

<sup>8</sup> See JE Álvarez, *International Organizations as Law-Makers* (OUP, Oxford 2005), 554.

<sup>9</sup> GG Fitzmaurice, *The Law and Procedure of the International Court of Justice* vol I (Grotius, Cambridge 1986), 648. See also *Barcelona Traction, Light, and Power Company, Limited (Belgium v Spain)* (Second Phase) [1964] ICJ Rep 6, Separate Opinion of Judge Tanaka, 65-6: ‘[t]he most important function of the Court ... is to be found not only in the settlement of concrete disputes, but also in its reasoning, through which it may contribute to the development of international law. It seems hardly necessary to say that the real life of a decision should be found in the reasoning rather than in the conclusion.’

<sup>10</sup> A Boyle and C Chinkin, *The Making of International Law* (CUP, Cambridge 2007), 272.

<sup>11</sup> Weeramantry, above n 3, 319.

general principle, gives judicial institutions ‘a degree of considered elaboration which no legislature has the opportunity to achieve.’<sup>12</sup> When they hand down such decisions, they make a ‘definitive and authoritative impact on the development of law.’<sup>13</sup>

### III. INTERNATIONAL COURT OF JUSTICE

#### A. The formal role of the International Court in international law-making

One must proceed from the starting-point that international courts, and hence the ICJ, have no formal role in law-making. It is true that it operates as the single permanent international judicial institution with competence over all matters of general international law,<sup>14</sup> and the ‘principal judicial organ’ of the United Nations Organization.<sup>15</sup> However, nothing in the ICJ Statute can be read as suggesting that its judgments are creative of international law.<sup>16</sup> It has no automatic compulsory jurisdiction over UN member States, even if these are *ipso facto* parties to its Statute.<sup>17</sup> It has no appellate jurisdiction over other international tribunals, and thus no competence to ensure ‘systematic coherence’ between the judgments of different international judicial institutions.<sup>18</sup> What is more, it hardly bears recalling that Article 38 of the ICJ Statute relegates ‘judicial decisions’ to subsidiary means

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<sup>12</sup> *ibid* 320.

<sup>13</sup> M Lachs, ‘Some Reflections on the Contribution of the International Court of Justice to the Development of International Law’, (1983) 10 *Syracuse Journal of International Law and Commerce* 239, 245.

<sup>14</sup> See Art. 36, para. 1, of the Court’s Statute, *supra* note **Error! Bookmark not defined.**: the Court enjoys jurisdiction over any dispute that States may submit to it, including any matters provided for in the Charter, or in ‘treaties or conventions in force.’ Art. 14 of the Covenant of the League of Nations (in force 20 August 1921), UKTS 4 (1919) Cmd 153, was even more clear: the Permanent Court of International Justice was ‘competent to hear and determine any dispute of an international character’ submitted to it.

<sup>15</sup> Art. 92 of the Charter of the United Nations, 1 UNTS xvi; UKTS 67 (1946), Cmd 7015 (26 June 1945).

<sup>16</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Merits) [1982] ICJ Rep 18, Dissenting Opinion of Judge Gros, 143, 152.

<sup>17</sup> Statute of the International Court of Justice, *as annexed to* the Charter of the United Nations (26 June 1945) 1 UNTS xvi; UKTS 67 (1946), Cmd 7015.

<sup>18</sup> As Boyle and Chinkin, above n 10, 263, put it, ‘[c]onstitutionally it is simply one court among many.’

for the determination of the rules of law, alongside the ‘teachings of the most highly qualified publicists’.<sup>19</sup> Thus, even though ‘judicial decisions’ (those of all courts, not only the ICJ’s) are recognised as subsidiary sources of the law under Article 38, they assist primarily in the elucidation and interpretation of legal norms that are grounded on a formal source of international law.<sup>20</sup> Perhaps for reasons of continuity, or because the ICJ Statute is annexed to the UN Charter, the sources of international law as enumerated in Article 38 are ‘often put forward as a complete statement of the sources of international law’.<sup>21</sup> In any event, no international court or tribunal formally recognises its judgments as a primary source of international law.

Yet to focus purely on the formal role of the Court’s judgments would be short-sighted, and in practice, few have been so insistent. To give but one example, in 1947, the General Assembly proclaimed that ‘it is...of paramount importance that the Court should be utilized to the greatest practical extent in the progressive development of international law’.<sup>22</sup> This was, to be sure, a mere preambulatory clause, encouraging States and United Nations organs to make greater use of the ICJ. However, in its substance, Resolution 171 also embodied the belief that the ICJ, its principal judicial organ, could be used effectively as an

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<sup>19</sup> Art. 38 (1)(d) of the ICJ Statute, *supra* note **Error! Bookmark not defined.**; RY Jennings, ‘The Judiciary, International and National, and the Development of International Law’ (1996) 45 *International and Comparative Law Quarterly* 1, 3: ‘Article 38 constitutes a necessary recognition of the basic principle of the process of adjudication that judges, whether national or international, are not empowered to make new laws. Whatever modification and development of the law is made ‘must be seen to be within the parameters of permissible interpretation’.

<sup>20</sup> Baron Descamps (Belgium)’s colourful description of the international judicial function: ‘[d]octrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation.’ See PCIJ Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16<sup>th</sup>-July 24<sup>th</sup> 1920, with Annexes* (The Hague, Van Langenhuisen Bros 1920), 336. See also Lauterpacht, *supra* note 1, 22.

<sup>21</sup> See J Crawford, *Brownlie’s Principles of Public International Law* (7<sup>th</sup> edn OUP, Oxford 2012), 22, who in fact suggests that they cannot be regarded as a straightforward enumeration, thus breaking somewhat with Brownlie’s less critical view; M Shaw, *International Law* (7<sup>th</sup> edn CUP, Cambridge 2011) 6. P Daillier, A Pellet, M Forteau and D Müller, *Droit international public* (8<sup>th</sup> edn LGDJ, Paris 2009), 126, regard them as an ‘*énumération universellement acceptée des sources formelles du droit international*’.

<sup>22</sup> UNGA, ‘Need for greater use by the United Nations and its organs of the International Court of Justice’, GA Res 171 (II) (1947), UN Doc A/519, 103.

agent for ‘progressive development’<sup>23</sup> as well as the faith that the administration and development of substantive international law could safely be trusted to impartial, objective judges, whose determinations would ‘naturally’ have repercussions ‘in many spheres including the political’.<sup>24</sup> As such, even though a formal law-making role was denied to it, from the outset it has been envisaged that it could make a substantive contribution to the development of international law.

## **B. Limitations to the International Court’s law-making authority**

Before turning to the law-making potential of the Court, one must first identify some of the limitations under which it operates. First is the essentially reactive character of the International Court’s work.<sup>25</sup> Judicial opinions are essentially concerned with resolving past disputes: it is only when they are viewed as precedents that they gain the potential to determine the law in the future. Because it depends on cases instituted before it, or opinions requested of it, the Court cannot exercise the same systemic function as a domestic supreme court that can select the portfolio of cases that will be argued before it. The Court’s relatively weak jurisdictional structure serves as a second limitation; dependent on the consent of States parties to a dispute, and with a minority of States having accepted its compulsory jurisdiction,<sup>26</sup> it is not guaranteed a regular docket of cases,<sup>27</sup> and there is no possibility of

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<sup>23</sup> A concept generally associated with Article 1 of the ILC Statute: *see* UNGA, ‘Establishment of an International Law Commission’, GA Res 174 (II), UN Doc A/519 (21 November 1947), 105.

<sup>24</sup> R Higgins, *Problems and Process* (OUP, Oxford 1994), 202; R Higgins, ‘International Law and the Avoidance, Containment, and Resolution of Disputes’, (1991-V) *Recueil des Cours* 9, 261.

<sup>25</sup> *ibid* 785.

<sup>26</sup> As of 31 July 2012, 67 States had deposited with the Secretary-General a declaration of acceptance of the Court’s compulsory jurisdiction in accordance with Article 36, paragraph 2: *see* Report of the International Court of Justice (1 August 2011-31 July 2012), GAOR 67<sup>th</sup> Sess. Supp. No. 4, UN Doc A/67/4, 1, para. 7.

<sup>27</sup> It cannot but be noted with some humour that the 1974 Reports of the International Court were six pages long.

systemic contribution due to this ‘exceptionality’.<sup>28</sup> Further, the judges of the Court have stated extra-judicially that they are ‘reluctant lawmakers’, eager not to be perceived to be making law.<sup>29</sup> As such, its body of case law has developed with a keen sense of deference to State consent, and a great reluctance to be seen as overstepping such consent.<sup>30</sup>

The caution of the Court in relation to the consent of parties before also translates into making any pronouncements on substantive international law. The Court’s restraint has been consistent, as is evidenced by the 1974 judgment on *Fisheries Jurisdiction*, where Germany and the United Kingdom filed proceedings against Iceland: when considering the codification and progressive development of the law of the sea simultaneously taking place at the third Conference of the Law of the Sea, it declared that ‘[i]n the circumstances, the Court as a Court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.’<sup>31</sup> Similarly, in its advisory opinion in the *Legality of the Use or Threat of Nuclear Weapons*, the Court reaffirmed that:

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<sup>28</sup> G Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’ (1999) 31 New York Journal of International Law and Policy 919, 922.

<sup>29</sup> D Terris, CP Romano & L Swigart, *The International Judge: An Introduction to the Men and Women who decide the World’s Cases* (OUP, Oxford 2007), 129. See also M Shahabuddeen, *Precedent in the World Court* (Grotius, Cambridge 1997), 233.

<sup>30</sup> See eg *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, [2006] ICJ Rep 6, 39, para. 88 (emphasising the importance of consent in relation to compromissory clauses conferring jurisdiction; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177, 204, para. 62 (emphasising the need for consent to the Court’s jurisdiction to be ‘certain’, and not only on matters relating to jurisdiction based on *forum prorogatum*); and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)* (Preliminary Objections), Judgment of 1 April 2011, para. 131, on how prior resort to negotiations represents a limit of consent given by States. See also, generally, S Oda, ‘The Compulsory Jurisdiction of the International Court of Justice: A Myth?’ (2000) 49 International and Comparative Law Quarterly 251.

<sup>31</sup> *Fisheries Jurisdiction (United Kingdom v Iceland)* (Judgment) [1974] ICJ Rep 181, 192. This echoes the earlier statement in *Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15, Separate Opinion of Judge Fitzmaurice, 98-99:

... courts of law are not there to make legal pronouncements *in abstracto*, however great their scientific value as such. They are there to protect existing and current legal obligations, to afford concrete reparation if a wrong has been committed, or to give rules in relation to existing and continuing legal situations. Any legal pronouncements that emerge are necessarily in the course, and for the purpose, of doing one or more of these things. Otherwise they serve no purpose falling within or engaging the proper function of courts of law as a judicial institution.



It is clear that the Court cannot legislate ... Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules ... The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.<sup>32</sup>

### C. The law-making authority of the International Court

#### 1. *Beyond persuasive authority?*

With no formal authority on which to fall back upon, the persuasive authority of a judgment of the Court, in relation to law-making at least, remains theoretically dependent purely on the quality of the reasoning contained in that judgment; nevertheless, the Court makes a substantial contribution to the development of international law.<sup>33</sup> From picking up any treatise on general international law,<sup>34</sup> it is evident that there is no gainsaying the practical authority and power of judgments of the Court.<sup>35</sup> Erstwhile judge Thomas Buergenthal has called the Court's engagement with international law a process of 'normative accretion',<sup>36</sup> through which law is not created as with legislative processes, but rather in a more modest, incremental fashion, clarifying ambiguities and resolving perceived gaps in the law. As such, there is much to the argument that the Court's influence on international legal

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<sup>32</sup> *Legality of the Use or Threat of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 226, 237, para. 18.

<sup>33</sup> See N Petersen, 'Lawmaking by the International Court of Justice—Factors of Success' (2011) 12(5) German Law Journal 1295, who attempts to identify empirical, observable developments in international law and determine whether there exists a causal link with a judgment of the Court.

<sup>34</sup> See Lauterpacht, *supra* note 7, 5; A Pellet, 'Article 38', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice – A Commentary* (2<sup>nd</sup> edn OUP, Oxford 2012), 731, 862 *et seq.*; Brown, 'Article 59', above n 56, 1444-5; and Boyle and Chinkin, above n 10, 268.

<sup>35</sup> Jennings, above n **Error! Bookmark not defined.**, 8.

<sup>36</sup> T Buergenthal, 'Lawmaking by the ICJ and Other International Courts' in (2009) Proceedings of the American Society of International Law 403, 403.

development is essentially *interstitial*:<sup>37</sup> its intervention is punctual, and can later be ignored, overruled or limited.

Even so, the systemic constraints of operating in a decentralised framework give the Court's judgments a heightened influence on the internal understanding of legal rules within the system, offering a set of normative expectations that can be relied upon by States. It is an agent in the international law-making process.<sup>38</sup> Accordingly, once a general statement on a legal principle or rule has been elucidated by the International Court, both parties and non-parties cannot in good faith contest that general principle.<sup>39</sup> Recognition of the International Court of Justice's role as the 'principal judicial organ' of the United Nations<sup>40</sup> by all States compounds the issue, suggesting that the Court enjoys a systemic function exceeding that of other international courts. Certainly, the Court regards its own judgments as influential, and has expressly granted them a high persuasive value as precedent: '[t]o the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.'<sup>41</sup> Its Registry

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<sup>37</sup> A term borrowed, as I understand it, from V Lowe, 'The Politics of Law-Making, in M. Byers (ed), *The Role of Law in International Politics* (OUP, Oxford 2000) 207, 212-3.

<sup>38</sup> CJ Tams and A Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781, 784; Weeramantry, above n 3, 311.

<sup>39</sup> GG Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in *Symbolae Verzijl* (Martinus Nijhoff, The Hague 1958) 153, 172-3, terms judicial decisions 'quasi-formal' sources of international law. Weeramantry, above n 3, 321, goes further: the Court's 'role and duty must extend beyond the immediate case to the elucidation of relevant principles that have arisen for discussion in the context of the case, thereby helping in the development of the law.'

<sup>40</sup> As spelt out in Art. 92 of the Charter, above n **Error! Bookmark not defined.**

<sup>41</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Jurisdiction), [2008] ICJ Rep 412, 428, para. 53: This habit is nothing new: the Permanent Court already stated in *Case of Readaptation of the Mavrommatis Jerusalem Concessions, Jurisdiction*, 1927 PCIJ Ser A No 11, at 18, the Court would have 'no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound.' Moreover, it was evident to all besides the Court prior to 2008: see Pellet, 'Article 38', *supra* note 34, 855-6; M Mendelson, 'The International Court of Justice and the Sources of International Law' in V Lowe and M Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Grotius Publications, Cambridge 1996) 63, 81.

has expressed a desire for ‘continuity’.<sup>42</sup> But there is more: beyond the walls of the Peace Palace, its judgments are regularly scrutinised and observed by the International Law Commission,<sup>43</sup> the General Assembly,<sup>44</sup> and other international courts.<sup>45</sup> As such, the Court’s view on the binding nature of a rule, if accepted by other participants in the international legal community, often determinative. With ‘not even the semblance of any kind of hierarchy or system’,<sup>46</sup> the authority commanded by the Court is thus particularly noteworthy. The Court’s role has been one that perforce clarifies and tidies up the substance of international law, and one that serves as a consolidating force. It is an ‘agent’<sup>47</sup> in the international legal process, participating in the process of legal development without a formal role being assigned to it.

As such Court’s greatest contribution has been to lending authority to the rules that it enunciates and applies, as often, and especially in relation to customary law, the Court’s recognition of it is seen as determinative.<sup>48</sup> The Permanent Court set down rules that are now

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<sup>42</sup> The Registry of the Court, ‘The International Court of Justice’, (ICJ Publications, 1979), 62-3.

<sup>43</sup> Tams and Tzanakopoulos, above n 43, 783 make express reference to the ILC’s Commentaries to what have become Arts. 19-20 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 8 and Art. 51 of the ‘Articles on the Responsibility of States for Internationally Wrongful Acts’, in Report of the International Law Commission on the Work of its 53rd Session, UN Doc A/56/10 Chap. V (2001) GAOR 56th Session Supp 10. One can add the Art. 14 of the Draft Articles on Diplomatic Protection, GAOR 61<sup>st</sup> Sess, Supp No 10, UN Doc (A/61/10), which codifies the Court’s practice on the exhaustion of local remedies..

<sup>44</sup> See eg GA Res 171 (II) (14 November 1947), UN Doc A/RES/171(II); GA Res 3232 (XXIX) (12 November 1974), UN Doc A/RES/3232.

<sup>45</sup> Examples abound. The ECtHR has recently done so in *Behrami v France*, *Saramati v France, Germany & Norway*, Apps. No. 71412 & 78166/01 (May 2, 2007) (decisions on admissibility), (2007) 44 EHRR 52, para. 147. The ECJ has referred to ICJ case law frequently: see e.g. *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Group (Case C-286/90)* [1992] ECR-I-6019, para. 10; *Opel Austria GmbH v Council of the European Union (Case T-115/94)* [1997] ECR II-39, paras. 90, 93; *Racke GmbH & Co v Hauptzollamt Mainz (Case C-162/96)* [1998] ECR I-3655, paras. 24 *et seq.*, para. 50;

<sup>46</sup> Jennings, above n **Error! Bookmark not defined.**, 5.

<sup>47</sup> Lauterpacht, above n 7, 5.

<sup>48</sup> Pellet, above n 34, 864.

seen as foundational to the law on State responsibility.<sup>49</sup> To give but a few further examples, the International Court has made pronouncements on the severability of reservations to treaties;<sup>50</sup> its interpretation of the term ‘armed attack’ contained in Article 51 of the Charter, persisting in its view that only attacks committed by States could fall within its scope;<sup>51</sup> on the scope of the right to self-determination;<sup>52</sup> and on the legal effect of Security Council resolutions with respect to actors other than UN Member States and inter-governmental organisations.<sup>53</sup> Further, it could be argued that the Court’s judicial pronouncements with respect to boundary delimitations<sup>54</sup> or with maritime delimitations<sup>55</sup> appear to be ‘objective law’, in that these determinations are to be respected by all States.<sup>56</sup> This conclusion is misplaced: Article 59 calls upon the parties to a dispute to comply with its legal findings, and other States simply respect the positions as to their mutual boundary. Although the effect is law-creative, it is the compliance of the States involved, rather than the Court’s judgment itself, that formally translates into objective law.

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<sup>49</sup> Pellet, 866, cites *Mavrommatis Palestine Concessions*, PCIJ Ser A No 2, 12, where the Permanent Court set out the basic rule on diplomatic protection for injuries suffered to nationals, and *Factory at Chorzów*, PCIJ Ser A No 17, 29, where it set out that the breach of an international engagement involved an obligation to make reparation.

<sup>50</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 22-5.

<sup>51</sup> *Israeli Wall*, above n 77, para. 139.

<sup>52</sup> *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 31, para. 55.

<sup>53</sup> *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, (Advisory Opinion) [2010] ICJ Rep 403, 450 paras. 116-17.

<sup>54</sup> *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Judgment) [1994] ICJ Rep 6; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Application to Intervene by Equatorial Guinea) [1999](II) ICJ Rep 1029; and *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment of 19 November 2012.

<sup>55</sup> *Maritime Delimitation in the Black Sea (Romania/Ukraine)* [2009] ICJ Rep 61; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213; *Maritime Dispute (Peru v Chile)*, currently under deliberation: see ICJ Press Release 2012/37.

<sup>56</sup> C Brown, ‘Article 38’, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice – A Commentary* (2<sup>nd</sup> edn OUP, Oxford 2012), 1439.

## 2. Judicial law-making in the application and interpretation of unwritten law

Certainly, the Court's interpretation of written law, most prominently international treaties and the unilateral acts of States, can constitute an important source of judicial law-making. Of considerable academic interest, however, is the Court's role in the interpretation and application of *unwritten* law, in particular of customary law. Although certainly judicial decisions are not formally *constitutive* of customary law, they help to establish its existence, providing written confirmation of its existence.<sup>57</sup> As Jiménez de Aréchaga has observed, a judicial pronouncement on a point of customary law becomes a 'focal point' that inspires subsequent State practice and thus helps to 'harden' a rule.<sup>58</sup> And it is true that the methodology of how the Court has addressed custom demonstrates law-making potential: despite the Court's doctrinal insistence on State practice and *opinio juris*, it in fact rarely refers to these elements.<sup>59</sup> So goes it with the other unwritten formal source under Article 38 of the Statute, general principles of law. These principles, conceived as subsidiary in so far as they allow for the Court to look to the practice of domestic and international jurisdictions for certain principles to be applied in a given case.<sup>60</sup> The same approach has been adopted by the

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<sup>57</sup> A. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757, goes so far as to declare the Court 'the ultimate arbiter in some cases' of the existence and content of custom, 772.

<sup>58</sup> See A Cassese and JHH Weiler (eds), *Change and Stability in International Law-Making* (Gruyter, Berlin 1989), 3. This is to be distinguished from the 'focal point' in game theory: cf. T Ginsburg and RH McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution' (2004) 45 *William and Mary Law Review* 1229, 1269; and RH McAdams, 'A Focal Point Theory of Expressive Law' (2000) 86 *Virginia Law Review* 1649.

<sup>59</sup> Boyle and Chinkin, above n 10, 279, specifically point to *Anglo-Norwegian Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, *Icelandic Fisheries Jurisdiction*, above n 31, and *Military and Paramilitary Activities in and against Nicaragua (Merits)* [1986] ICJ Rep 14. Perhaps the most flagrant example is in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Rep 3, para. 58, where the Court felt no need to justify its methodology in reaching its conclusion on the immunity of foreign ministers. The Court's formalism drew the ire of Judge *ad hoc* Van den Wyngaert in her Dissenting Opinion, *ibid* 137, esp 145, para. 13, where she concluded that negative State practice still requires *opinio juris*. But cf. the notable exception of *Jurisdictional Immunities of the State (Germany v Italy)*, Judgment of 3 February 2012, para. 77, where the Court drew extensively on domestic court judgments as 'evidence of State practice'.

<sup>60</sup> The Court is sparing with these: although in its early days the Permanent Court recognised equity in the *Free Zones of Gex* case (*Switzerland v France*), PCIJ Ser A No 24, 10; the 'clean hands' doctrine (see *Diversion of*

*ad hoc* international criminal tribunals' approach to general principles, using these to fill perceived 'gaps' and creating new norms of international criminal law,<sup>61</sup> although it would seem that the *ad hoc* tribunals have adopted a consciously teleological interpretation of international law, especially in relation to protecting 'human dignity'.<sup>62</sup>

### 3. Judicial law-making through advisory opinions

An interesting final aside relates to the International Court's advisory function. Courts seldom give legal advice, advice being the exposition of abstract legal principles to formulate and guide *future* action, rather than the classical judicial function of applying the law with finality to a series of facts that have already occurred, in an attempt to settle a dispute.<sup>63</sup> Whatever faith placed in the advisory function as a law-creating function is purely contingent: in order to constitute *law*, the opinions must be accepted by the relevant organs (ideally also by the *requesting* organ!), and form the basis for subsequent development.<sup>64</sup> Advisory opinions only constitute 'advice',<sup>65</sup> and are not binding;<sup>66</sup> and the Court's hesitation

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*Water from the River Meuse (the Netherlands v Belgium)* (Judgment) PCIJ Ser A/B No 70), in general the Court has been parsimonious in its reference to such principles: see Pellet, above n 34, 838-9

<sup>61</sup> See e.g. *Prosecutor v Delalić*, IT-96-21-A (20 February 2001), para. 173 (declaring the acts enumerated in Common Article 3 to be international crimes as they 'shock the conscience of civilised people'); *Furundžija*, above n 61, paras 174 *et seq.* (situating the definition of rape as a crime against humanity by reference to principles found in domestic legal orders); *Prosecutor v Kupreškić*, IT-95-16-A (23 October 2001), para. 75 (rejecting national concepts in determining under which test additional evidence reveals an error of fact of such magnitude as to occasion a miscarriage of justice; and *Prosecutor v Akayesu*, ICTR\_96-4-T (2 September 1998), para. 597 (concluding through a 'conceptual approach' that sexual violence was a form of torture because it was a crime against personal dignity).

<sup>62</sup> See *Furundžija*, above n 61, para. 184, and *Prosecutor v Celibici*, IT-96-21 (16 November 1998), para. 170, in both of which the ICTY has made reference to purposive interpretations in line with the concept of 'human dignity'.

<sup>63</sup> For similar reasons, JB Moore opposed the giving of advisory opinions by the Permanent Court: see 'The Question of Advisory Opinions', Memorandum by Judge Moore presented 18<sup>th</sup> February 1922, 1922 PCIJ Ser D, No 2 (Annex 58a).

<sup>64</sup> K Oellers-Frahm, 'Lawmaking through Advisory Opinions?' (2011) 12(5) German Law Journal 1033, 1049. But cf. A von Bogdandy and I Venzke, 'Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung', (2010) 70 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 1, 11.

<sup>65</sup> See, generally, MO Hudson, 'The Effect of Advisory Opinions of the World Court' (1948) 42 American Journal of International Law 630.

to be seen as law-creating is such that in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, it declined to ‘conclude definitively’ on the permissibility of the threat or use of nuclear weapons, in an unprecedented *non liquet*.<sup>67</sup>

The tension between the advisory function and the contentious function within a judicial body goes deep into its function, and has been explored systematically elsewhere.<sup>68</sup> It suffices, however, to appreciate that the advisory function departs somewhat from the classic dispute-settling function of judicial institutions.<sup>69</sup> For example, this may be the reason that the parties empowered to submit disputes—States—are strictly separated from those authorised to request advisory opinions under Article 96, para. 1 of the Charter, namely, United Nations organs and specialised agencies.<sup>70</sup> The Court itself has addressed the concern over possible overlap of these functions, and that the advisory function could be used to circumvent the lack of acceptance of its contentious jurisdiction.<sup>71</sup>

In its advisory capacity, the Court has made a substantial contribution to the institutional law of the United Nations. It has expressly affirmed, as a part of the normal exercise of its judicial power, the competence to interpret the Charter in *Admission of a*

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<sup>66</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, [1950] ICJ Rep 65, 71; *Mazilu*, above n 80, 189, para 31.

<sup>67</sup> *Nuclear Weapons*, *supra* note 32, 266 para. 105 (Operative Clause), para. 2E. The Court’s *non liquet* here may be indicative of the present state of the international legal system; but it is also a forceful statement of the Court’s position on its systemic function. See eg para. 14 of Judge Guillaume’s Separate Opinion: ‘...it is not the role of the judge to take the place of the legislator ... the Court must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign States.’

<sup>68</sup> This tension is explored in G Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press, forthcoming), Ch 3 (‘The Judicial Character of the Court’).

<sup>69</sup> However, a few domestic supreme courts simultaneously and successfully discharge advisory functions: see eg the Supreme Court of Canada (Section 53 of the *Supreme Court Act*, RSC 1985 Ch. S-26); and the Supreme Court of India (Constitution of India, pt V).

<sup>70</sup> The division dates from the time of the Permanent Court: see Art. 14, para. 3, of the Covenant of the League of Nations. See also Oellers-Frahm, above n 64, 1034-5.

<sup>71</sup> See *Applicability of Article IV, section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, [1989] ICJ Rep 177, 189. See also *Israeli Wall*, where Israel raised this angrily in written proceedings and refused to participate in the oral proceedings before the Court.

State.<sup>72</sup> It has affirmed the international legal personality of the United Nations Organization.<sup>73</sup> It has specified the extent of the supervisory power of the General Assembly with respect to territories under the League of Nations' mandate system.<sup>74</sup> It has offered a more precise delineation of the competences of the non-judicial principal organs in respect to the budget.<sup>75</sup> It has allocated the power to interpret the Charter.<sup>76</sup> It has elucidated the competence of the non-judicial principal organs in matters of international peace and security.<sup>77</sup> It has claimed its own power to consider objections to resolutions of the General Assembly and Security Council.<sup>78</sup> It has clarified the ability of political organs to create subsidiary judicial organs.<sup>79</sup> It has clarified, in turn, the UN's relationship with its member States<sup>80</sup> (and non-member States<sup>81</sup>), and its specialised agencies (vis-à-vis the member States

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<sup>72</sup> *Conditions for Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1947] ICJ Rep 57, 61.

<sup>73</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

<sup>74</sup> *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 131 *et seq.*

<sup>75</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 167.

<sup>76</sup> *ibid* 168, where it affirmed the powers of the various principal organs, including the Court itself, in interpreting the Charter.

<sup>77</sup> *ibid* 163, regarding the concurrent role of the General Assembly alongside the Council in peacekeeping; and 163, the exclusive competence of the Security Council to take coercive action. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [hereinafter 'Israeli Wall'], 146, where it affirmed the competence of the General Assembly in matters where the Security Council is deadlocked under the 'Uniting for Peace' resolution.

<sup>78</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 45.

<sup>79</sup> *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 57.

<sup>80</sup> See *Reparation for Injuries*, above n 73. In addition, it has considered the obligations of member States when confronted with a mandatory Security Council decision (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Preliminary Objections) [1998] ICJ Rep 9, or a General Assembly resolution that is not 'merely hortatory' (*Certain Expenses*, above n 75). Member States are also bound by obligations on them under the Convention on Privileges and Immunities entered into by the UN and member States: see, e.g., *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 177 [hereinafter 'Mazilu'], and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1998] ICJ Rep 62 [hereinafter 'Cumaraswamy'], where the Court considered the nature of the breadth of immunities from national law;



of those specialised agencies);<sup>82</sup> its ability to afford protection to its staff<sup>83</sup> and ensure their fair treatment;<sup>84</sup> the scope of the powers of the principal organs to establish subsidiary organs.<sup>85</sup>

Thus, the law-making element in advisory opinions is in essence a contribution within the process of the development of the law; it is not related to the Court's formal authority or position. The Court's judicial statement as to what it perceives the law to be, having that normative impact on subsequent practice, may initiate a process of clarifying or even creating new customary law, through States legitimating their policy choices by reference to a judicial pronouncement by the Court.<sup>86</sup>

#### IV. OTHER INTERNATIONAL COURTS AND TRIBUNALS

It is truly remarkable that the jurisdictional structures of most international judicial bodies established subsequent to the PCIJ/ICJ have diverged from its traditional, consensualist structure. In part, this may be due to their institutional proliferation, expanding both in number and into areas far beyond the ICJ's work, i.e. dispute settlement between States and

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*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 3 [hereinafter '*PLO Mission*'], on the UN's relationship with the United States.

<sup>81</sup> In the *Reparation for Injuries* opinion, above n 73, 182, the Court finds that the UN to possess international legal personality opposable to member states and non-member states alike.

<sup>82</sup> MS Amr, *The International Court of Justice as the Principal Judicial Organ of the United Nations* (Kluwer, The Hague 2003), 159-167 and his discussion of *Mazilu*, *Cumaraswamy*, and *PLO Mission*, above n 80, and the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73 [hereinafter '*WHO-Egypt*'].

<sup>83</sup> The most obvious example is *Reparation for Injuries*, above n 73, 185.

<sup>84</sup> See *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 57.

<sup>85</sup> *Application for Review of Judgement No 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 166 and *Effect of Awards*, above n 79.

<sup>86</sup> Oellers-Frahm, *supra* note 64, 1053.

the giving of advisory opinions to international organisations. The contemporary international judicial system now admits of individuals being able to submit a claim against a State to an international court; it also admits of courts exercising powers normally associated with a public function, such as the trial of an individual, or the review of domestic legislation or acts for conformity with international obligations. This diversification of functions represents a substantive expansion of the work of international judicial institutions.

Some structural differences between these newer bodies and the ICJ may have helped to engender these advances. If one examines the bodies under examination here—the European and Inter-American courts on human rights, the World Trade Organization Appellate Body (WTO AB) and the *ad hoc* criminal tribunals established by the Security Council for the former Yugoslavia and for Rwanda (ICTY and ICTR)—one notes that these are characterised by compulsory jurisdiction over certain categories of disputes, representing a qualitative shift vis-à-vis the International Court of Justice.<sup>87</sup> Perhaps this is due to the fact that each body has a limited subject-matter, unlike the Court's general competence over all areas of international law.<sup>88</sup> But that more limited competence *ratione materiae* also brings with it a certain claim to primacy over that particular area of the law, suggesting that that tribunal has a special obligation of legalisation within that particular area of the law. It also has allowed, to a point, for access to non-State actors to the work of those particular bodies—a substantial difference when compared to the ICJ.<sup>89</sup>

Strikingly, another commonality between the various international courts and tribunals has been their consistent desire not to fragment away from international law, but rather, to

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<sup>87</sup> Shany, above n 4, 79.

<sup>88</sup> *ibid* 80.

<sup>89</sup> *ibid* 79. See also R Higgins, 'The ICJ, the ECJ, and the Integrity of International Law', (2003) 52 *International and Comparative Law Quarterly* 1, 13. The present author has also written about the Court's (parsimonious) engagement with non-State actors: see GI Hernández, 'Non-State Actors from the Perspective of the International Court of Justice', in J d'Aspremont (ed), *Participants in the International Legal System: Theoretical Perspectives* (Abingdon (UK): Routledge Cavendish, 2011), 140.

contribute to the general development of that legal order. Aside from an expected—and obvious—fidelity to their constitutive statutes and the specialised area of international law on which they focus, the emergence of judicial institutions entrusted with various treaty regimes has ‘*not undermined legal security, predictability or the equality of legal subjects*’.<sup>90</sup> Whatever the proliferation of international courts and tribunals, there is still a *system* of international law.<sup>91</sup>

### **A. European Court of Human Rights and Inter-American Court of Human Rights**

Law-making by the European and Inter-American courts for human rights is characterised primarily by the fact that both bodies enjoy, under their respective conventions, final interpretative authority. Certainly, the bulk of the human rights courts’ work is to provide for individual redress against human rights violations. Yet in doing so, the courts do exercise a law-making role: they aim to ensure continuity and consistency over time in the application of their respective treaties within the legal orders established by them.<sup>92</sup> Moreover, because both courts have consciously adopted a ‘dynamic’ interpretation of the rights contained in the Convention, they have often widened the scope of protection by the Convention.<sup>93</sup>

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<sup>90</sup> Report of the Study Group of the International Law Commission finalised by M Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, GA Doc A/CN.4/L.682 (13 April 2006), 248-9, para 492 [emphasis in original].

<sup>91</sup> B. Simma and D Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 *European Journal of International Law* 483; PM Dupuy, *L’unité juridique de l’ordre juridique international* (2002) 297 *Recueil des Cours* 12, 89; T Buergenthal, ‘Proliferation of International Courts and Tribunals: Is it Good or Bad?’ (2001) 14 *Leiden Journal of International Law* 267; PS Rao, ‘Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?’ (2004) 25 *Michigan Journal of International Law* 929.

<sup>92</sup> The term ‘constitutional’ has been (mis)used to describe this particular function: S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, Cambridge 2006), 7; L Wildhaber, ‘A Constitutional Future for the European Court of Human Right?’ (2002) 23 *Human Rights Law Journal* 161, 162; R Harmsen, ‘The European Court of Human Rights as a ‘Constitutional Court’: Definitional Debates and the Dynamics of Reform’, in J Morrison, K McEvoy and G Anthony (eds), *Judges, Transition, and Human Rights* (OUP, Oxford 2007) 33, 36; M Fyrnys, ‘Expanding Competences by Judicial Lawmaking: the Pilot Judgment Procedure of the European Court of Human Rights’ (2011) 12(5) *German Law Journal* 1231, 1232.

<sup>93</sup> The famous ‘living tree’ interpretation given in *Airey v Ireland*, 9 Oct. 1979, ECtHR Rep Series A No. 32, para. 26; further applied in *Stafford v the United Kingdom* (GC), No. 46295/99, judgment of 28 May 2002, paras. 67-68, and *Christine Goodwin v. United Kingdom* (GC) (11 July 2002) (Appl. No. 28957/95), para. 74.

Judicial law-making by the two human rights courts has occurred on both a substantive and a procedural level, and their case law has compelled States to make far-reaching changes to their domestic legislation on a number of rights protected by the conventions.<sup>94</sup> The ‘pilot judgment’ procedure pioneered by the European Court of Human Rights in *Broniowski v Poland*<sup>95</sup> is instructive. A response to the problem of repetitive cases designed to reduce the Court’s heavy caseload,<sup>96</sup> the procedure allows the European Court to focus on the identification of ‘systemic malfunctioning’ of domestic legal orders; the indication of appropriate remedial measures ‘normatively extends the binding effect of the European Court’s judgments and changes their legal nature’.<sup>97</sup> By moving away from the focus on the individual, in this respect, the legal effect of pilot judgments is to impose the European Court’s interpretations on the domestic legislative processes of States parties.

An example of a substantive innovation is the prohibition of amnesties by the Inter-American Court.<sup>98</sup> The Inter-American Court has, in a long series of cases, rejected the compatibility of amnesty legislation with the ACHR with respect to Argentina, Uruguay,

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The IACtHR has adopted a similar view with respect to certain provisions of the ACHR: see *Bámaca-Velásquez Case* (Guatemala) (2000) IACtHR (Ser. C) No.70, in *Annual Report of the Inter-American Court of Human Rights: 2000*, OEA/Ser.L/V/III.50/doc.4 (2000) 28, at para. 197.

<sup>94</sup> A thorough list of examples may be found in D Shelton, ‘The boundaries of human rights jurisdiction in Europe’, (2003) 13 *Duke Journal of Comparative and International Law* 95.

<sup>95</sup> *Broniowski v Poland* (GC), Judgment of 28 September 2005, (friendly settlement and just satisfaction), Reports of Judgments and Decisions 2005-IX. See Fyrnys, 1244-51 for extended commentary. The judgment in *Broniowski v Poland* was a response to the failure to amend Protocol No. 14 to the European Convention on Human Rights, and the subsequent resolution by the Committee of Ministers of the Council of Europe, in which it invited the Court to engage with ‘underlying systemic problems’ relating to the Convention: see Committee of the Ministers of the Council of Europe, Resolution on Judgments Revealing an Underlying Systemic Problem (12 May 2004), ECHR Doc Res (2004)3, *reprinted in* (2005) 26 *Human Rights Law Journal* 119.

<sup>96</sup> Fyrnys, *supra* note 92, 1232-33.

<sup>97</sup> *ibid.*

<sup>98</sup> See C Binder, ‘The Prohibition of Amnesties by the Inter-American Court of Human Rights’, (2011) 12(5) *German Law Journal* 1203, 1204.

Peru, and Chile.<sup>99</sup> In so doing, the Court focussed on the amnesty laws' *ratio legis*: in shielding perpetrators of grave human rights violations from prosecution, the Court determined that the non-derogable, *jus cogens* nature of the rights the crimes in issue (torture, extrajudicial killings, etc) meant that the amnesty laws in issue constituted a violation of the survivors' and victims' family members' rights to a fair trial and to judicial protection under the Convention.<sup>100</sup> As with the European Court, the underlying rationale behind the Inter-American Court's approach is its claim not only to be the authoritative interpreter of the Convention rights, but also of the importance of the legal order created by that instrument.

## **B. The *ad hoc* international criminal tribunals**

That the ICTY and ICTR, the '*ad hoc*' international criminal tribunals, have engaged in some 'adventurous law-making' is beyond dispute. Paradoxically, it was demanded from the ICTY to discharge its functions only by applying existing international law, and refrain at all times from creating or 'legislating' new customary law.<sup>101</sup> Yet it has been argued that the broad terms of Security Council Resolutions 827 and 955, establishing the ICTY and ICTR, respectively<sup>102</sup> in fact granted them *de facto* law-making authority.<sup>103</sup> The same was not

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<sup>99</sup> See Inter-American Commission on Human Rights, Cases 10.145, 10.181, 10.240, 10.262, 10.309, 10.311, IACHR Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14, corr.1 (1992-93) (Argentina), Inter-American Commission on Human Rights, Cases 10.029, 10.36, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375; IACHR Report No. 29/92, OA/Ser.L/V/II.83, doc. 14, corr. 1 (1992-93) (Uruguay); Inter-American Court of Human Rights, *Barrios Altos v Peru*, Merits, Judgment of 14 March 2001, Series C, No. 75, and *La Cantuta v Peru*, Merits, Reparations and Costs, Judgment of 29 November 2006, Series C, No. 162 (Peru); and Inter-American Court of Human Rights, *Almonacid Arellano y otros v Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, Series C, No. 154 (Chile)

<sup>100</sup> Binder, above n 98, 1211, who gives the example of *Barrios Altos v Peru*, *supra* note 99, para. 42.

<sup>101</sup> Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented (3 May 1993), UN Doc S/25704, para. 34.

<sup>102</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res 827, UN Docs S/25704.36, annex (1993) and S/25704/Add.1 (1993), UN Doc S/RES/827 (25 May 1993); and Statute of the International Criminal Tribunal for Rwanda, SC Res 955, UN Doc S/RES/955 (8 November 1994).

demanded of the ICTR, which was free to use customary international law and international treaty law,<sup>104</sup> regardless of whether it was part of customary law.<sup>105</sup> As such, the additional constraint placed on the ICTY seems to have led it to adopt an eccentric, ‘deductive’ method of determining customary law, stating the rule first, and then justifying that rule with reference to extremely limited case law and State practice.<sup>106</sup> The justification for this has been that State practice only ‘assists’, but rarely ‘constitutes’, the rule.<sup>107</sup> Rather surprisingly, in the *Kupreškić* judgment, the ICTY Trial Chamber even conceded that State practice did not support the proposition that custom had evolved on the subject of belligerent reprisals, only to conclude that the ‘imperatives of humanity or public conscience’ embodied in the ‘Martens Clause’<sup>108</sup> permitted it to deduce *opinio necessitatis* sufficient to establish

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<sup>103</sup> Perhaps because of the haste with which the tribunals were created: see M Kuhli, and K Günther, ‘Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals’ (2011) 12(5) German Law Journal 1261, 1264-5.

<sup>104</sup> Comprehensive Report of the Secretary-General on Practical Arrangements for the Effective Functioning of the International Criminal Tribunal for Rwanda, Recommending Arusha as the Seat of the Tribunal, UN Doc S/1995/134 (13 February 1995), para. 12.

<sup>105</sup> M Swart, ‘Judicial Lawmaking at the *ad hoc* Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”’, (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 459, 461, refers to the ICTR’s acknowledgment of this in *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), paras. 604-7; *Prosecutor v Musema*, Trial Judgment (27 January 2000), ICTR-96-13-T, para. 242.

<sup>106</sup> *ibid* 464; see also A Nollkaemper, ‘The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia’, in TA Vandamme and J-H Reestman (eds), *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems* (Europa Law Publishing, Groningen 2001), 17.

<sup>107</sup> Swart, *ibid* 466-8, offers a comprehensive analysis of the ICTY’s loose approach to identifying international crimes in customary international law, citing *Prosecutor v Tadić*, Appeals Judgment, IT-94-1-A, 15 July 1999, paras. 163 *et seq.* (the scope of the ‘protected person’ status under the grave breaches regime); *Prosecutor v Furundžija*, Trial Judgment, IT-95-17/1 (10 December 1998), paras. 162, 253 (extending the definition of torture under customary law); and *Prosecutor v Galić*, Appeals Judgment, IT-98-29-A (5 December 2003), para. 88 (identifying the prohibition of terror amongst the civilian population by reference to Art. 51 of Additional Protocol I and Art. 13(2) of Additional Protocol II as codifications of customary international law). See also, generally, G Mettraux, *International Crimes and the ad hoc Tribunals* (OUP, Oxford 2005), esp. 127 *et seq.*

<sup>108</sup> Common Article 3 of the 1949 Geneva Conventions and the First Additional Protocol: see Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950), 75 UNTS 851 Geneva Convention relative to the Treatment of Prisoners of War (entered into force 21 October 1950), 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950), 75 UNTS 287; and Protocol Additional to the Geneva Conventions of 12 August

customary law.<sup>109</sup> Strikingly, the ICTY there invoked various moral and practical justifications for its approach, thus confirming to an extent that it was engaging in a form of law-making in this particular area.<sup>110</sup>

### C. The World Trade Organization Appellate Body

Finally, an interesting quasi-judicial system merits some examination, namely, the WTO dispute-settlement system, which operates under the aegis of a single WTO Agreement.<sup>111</sup> At the apex of the WTO arrangement, the WTO Appellate Body (AB) exercises a powerful reviewing function over the various dispute-settlement bodies constituted under its rules,<sup>112</sup> ensuring the coherence and consistent application of the GATT treaties.<sup>113</sup> In this respect, the WTO may be distinguished from the various investment tribunals constituted under the ICSID Convention, all of which apply separate treaties and are subject to separate review mechanisms.<sup>114</sup>

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1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (entered into force 7 December 1978), 1125 UNTS 3.

<sup>109</sup> *Prosecutor v Kupreškić*, IT-95-16-T, 14 January 2000, para. 527. This is in line with A. Cassese, *International Law* (2<sup>nd</sup> edn OUP Oxford 2006), 160-1, arguing that the Martens Clause loosens the requirement of *usus* and elevates *opinio juris* in relation to the laws of humanity.

<sup>110</sup> Kuhli and Günther, above n 1272, 1275-6, suggest that these types of reasons constitute a form of ‘norm justification’ best practised by legislatures and law-creating agents, and not by judiciaries, who should engage in the identification and application of norms—not in justifying their validity.

<sup>111</sup> Marrakech Agreement Establishing the World Trade Organization (15 April 1994) in World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (CUP, Cambridge 2007) 4.

<sup>112</sup> The dispute resolution rules and procedures and formalized in the *Understanding on Rules and Procedures governing the Settlement of Disputes* [hereinafter ‘DSU’], administered by the Organisation in accordance with Article III:3 of the WTO Agreement.

<sup>113</sup> See I Venzke, ‘Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy’ (2011) 12(5) German Law Journal 1111, 1121.

<sup>114</sup> Although *cf.*, generally, SW Schill, *The Multilateralization of International Investment Law* (CUP, Cambridge, 2009), esp. 44 *et seq.*, who argues that the thickening network of BITs constitutes a process of multilateralisation of the investment law system.

The WTO Appellate Body has made a strong normative claim to authority through its systematic reliance on its own precedent, despite the fact that authoritative interpretation of the WTO Agreement vests *exclusive authority* to adopt interpretations of it in the Ministerial Conference and the General Council.<sup>115</sup> Yet from its inception, the WTO Appellate Body has made a point of referring to its previous decisions: although they are not binding, they are said to ‘create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.’<sup>116</sup> Much like the International Court, the lack of binding quality of its decisions is thus secondary to its persuasive power;<sup>117</sup> and the Appellate Body has in fact intimated that to do otherwise would amount to a failure of exercising a proper judicial function.<sup>118</sup> As such, it has asserted not only its power authoritatively to interpret States’ obligations under the GATT, but more importantly, its power to develop the law by way of interpretation. Examples abound: it has clarified and developed the scope of Article XX GATT, the umbrella clause relating to exceptions that can be invoked by States to the other obligations in the GATT.<sup>119</sup> It has clarified the intentionally vague language in Article 4(2)(b) of the WTO Agreement, in relation to the causation

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<sup>115</sup> See WTO Agreement, *supra* note 111, Art. IX:2. Although Art. 3.2 of the DSU also foresees that the adjudicative bodies must work with the objective of ‘providing security and predictability to the multilateral trading system’, the thrust of the Art. 3.2 is to curtail the adjudicative bodies’ powers: ‘[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.’

<sup>116</sup> Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8, 10 and 11/AB/R (4 October 1996), 14-15.

<sup>117</sup> Venzke, above n 113, 1124.

<sup>118</sup> Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (30 April 2008), para. 162.

<sup>119</sup> Venzke, above n 113, 1125-31, describes how in a number of cases, the WTO Appellate Body has contributed substantially to the interpretation of the term ‘necessity’ contained in Art. XX, as well as the proportionality test it imposes. He uses as examples three notable cases: Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996), 16-17; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/AB/R (12 October 1998) [hereinafter ‘*Shrimp-Turtle*’]; and Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 and 169/AB/R (11 December 2000), paras. 159-60.



analysis to be used in safeguard cases.<sup>120</sup> It has filled in gaps in the WTO Agreement relating to the procedures to be followed before it.<sup>121</sup> In so doing, it has established not only a substantive body of law, but one that is ‘autonomously developing’<sup>122</sup>, and has raised concerns over expansiveness in judicial law-making.<sup>123</sup> Given the WTO’s dispute-settlement body’s compulsory jurisdiction over all matters within its competence,<sup>124</sup> the Appellate Body’s decisions have potentially far-reaching significance.

#### **D. Interaction between international courts and tribunals?**

There is a certain reciprocal cross-fertilisation between international courts and tribunals, with the unlikeliest recent participant being the International Court of Justice. The ICJ appraised the ICTY’s case law in the *Bosnia Genocide* judgment of 2007 (only on questions of fact; it declined to endorse their legal findings); it has cited arbitrations (in *Continental Shelf* and the *Alabama* arbitrations);<sup>125</sup> it has referred to the findings of the European Court of Human Rights by analogy in order to interpret Article 7 of the

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<sup>120</sup> Appellate Body, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS/202/AB/R (8 March 2002); *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS/177/AB/R (16 May 2001); *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS/166/AB/R (19 January 2001). See RH Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’, (2004) 98 *American Journal of International Law* 247, 253-4.

<sup>121</sup> In *Shrimp-Turtle*, *supra* note 119, para 89, it interpreted Art. 13 of the DSU, above n 112, to allow for *amicus* briefs. In *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, paras. 5-10 (25 September 1997), it established that private lawyers may represent members in oral proceedings before it.

<sup>122</sup> A. von Bogdandy, ‘Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship’, (2001) 5 *Max-Planck Yearbook of United Nations Law* 609, 625.

<sup>123</sup> Steinberg, *supra* note 120, 257, suggests that debate has in fact intensified in the early years of the WTO, relative to debates about law-making under the GATT regime.

<sup>124</sup> Under Art. 6.1 of the DSU, above n 112. the adjudicative procedure does not depend on the consent of the respondent member.

<sup>125</sup> In the *Nottebohm Case (Preliminary Objection)* (Judgment) [1953] ICJ Rep 111, 119, the International Court referred to the *Alabama Claims* arbitration, (1872) Moore 1 *International Arbitrations* 495, in relation to the principle of *compétence de la compétence*. In *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18, 57, the Court referred to the arbitration in *Anglo-French Continental Shelf* (1977), (1979) 18 *ILM* 397 in relation to the method for delimiting maritime boundaries.

International Covenant on Civil and Political Rights.<sup>126</sup> It has even cited domestic courts: see *Jurisdictional Immunities of the State*, where it referred to domestic judgments as ‘evidence of State practice’.<sup>127</sup> The ICTY has equally engaged in a practice of citing the judgments of other courts and tribunals,<sup>128</sup> and has perhaps provided the clearest example of their subsidiary, non-binding nature.<sup>129</sup> The Tribunals’ citation to municipal courts has generally been in relation to general principles or State practice in confirming the existence of a customary rule.<sup>130</sup> Needless to say, and perhaps because they share a common Appeals Chamber, the two *ad hoc* tribunals extensively, but not always, cite each other’s decisions.<sup>131</sup> There are obviously more examples, notably, the WTO’s constant engagement with the international law rules on treaty interpretation,<sup>132</sup> and the practice of other courts.<sup>133</sup>

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<sup>126</sup> In *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639, 664, para. 68, the International Court confirmed its interpretation of Art. 13 of the International Covenant on Civil and Political Rights by referring to interpretations by the ECtHR and the IACtHR of similar wording in their respective conventions, noting that ‘the said provisions [were] close in substance’.

<sup>127</sup> *Jurisdictional Immunities of the State*, above n 59, para. 77.

<sup>128</sup> Swart, above n 105, 471-4.

<sup>129</sup> The Appeal Chamber rejected, after admittedly much consideration and engagement, the *Nicaragua* legal test of ‘effective control’ for the purpose of attribution (see *Nicaragua*, above n 59, paras. 105-15) preferring instead its own test of control of ‘an overall character’: see IT-94-1, judgment of 15 July 1999, para 99.

<sup>130</sup> See eg *Jurisdictional Immunities of the State*, above n 59, paras. 72-78 referring to the judgments of domestic courts in Egypt, Belgium, Germany, the Netherlands, France, Italy, the United Kingdom, Ireland, Slovenia, Poland, Serbia, and Brazil; and *Arrest Warrant*, above n 59, 24, para. 58, referring expressly to the United Kingdom House of Lords and the French Court of Cassation, but not to specific judgments. One can only presume that the Court was distinguishing the *Pinochet* and *Gaddafi* cases of those two courts, referred to by Belgium: see *ibid* 23, para. 56.

<sup>131</sup> See e.g. *Prosecutor v Jelesić*, IT-95-10-T (14 December 1999) para. 61, citing *Akayesu*, *supra* note 61, and *Prosecutor v Kayishema*, ICTR-95-1-A. Note, however, that the ICTY ultimately did not endorse the *Akayesu* definition of rape, proffering a more specific definition in *Prosecutor v Kunarac, Kovać and Vuković*, IT-96-23-T (22 February 2001), para. 438.

<sup>132</sup> From the outset, the WTO has made a point of referring to cases of other international courts and tribunals for guidance on rules of international law, notably the ICJ: see I Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’, (2010) 21 *European Journal of International Law* 605, 632. It also refers extensively to the work of the International Law Commission: see J Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 *American Journal of International Law* 535, 563.

<sup>133</sup> See above n 45 for examples of cross-citation by the European Court of Human Rights and the European Court of Justice.

The varied judicial institutions are surprisingly uniform in their application of general international law, and make frequent reference to one another.<sup>134</sup> As for the reasons for such mutual borrowing, it has been suggested again that it is due to the gravitational effects of judicial pronouncements: novel legal conclusions are better justified with persuasive authority from other international judicial institutions, as they enhance a judgment's legitimacy,<sup>135</sup> especially if there is a perceived 'gap' in the law. Any legal system has gaps that, as they are revealed, demonstrate that the legislator did not anticipate a certain situation: the judicial function's role is then to assume an essentially suppletive role, applying principles rooted in the system itself so as to extend the law into that particular dispute.<sup>136</sup>

## V. CONCLUSION

It bears recalling that judicial law-making is an essentially *retrospective* exercise: because the judicial institutions surveyed here have arrogated this role for themselves, it is only after the fact that one can determine whether their reasoning has in fact been adopted by wider international society.<sup>137</sup> As such, there is much in Schwarzenberger's comment that the law-making potential depends on 'the fullness and cogency of the reasoning' contained in a judgment'.<sup>138</sup> Yet ultimately,

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<sup>134</sup> J Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des Cours*, at 373; ILC Report on Fragmentation, above n 90 A Rosas, 'With a Little Help from my Friends: International Case Law as a Source of Reference for the EU Courts', in (2006) 5 *The Global Community Yearbook of International Law and Jurisprudence* 2005, 203, contains a repertory of citations from the European Court of Justice.

<sup>135</sup> Boyle and Chinkin, above n 10, 297.

<sup>136</sup> Weeramantry, above n 3, 313.

<sup>137</sup> Tams and Tzanakopoulos, above n 38, 785-6.

<sup>138</sup> G Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. 1 (Stevens & Sons, London 1957), 31. M Shaw, 'A Practical Look at the International Court of Justice', in M Shaw, 'A Practical Look at the International Court of Justice', in M Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (OUP, Oxford 1998) 11, 27, has suggested that its authoritativeness will be founded upon the 'constitutional function, perceived role and reputation of' a judicial institution. Lauterpacht, above n 7, 41, suggested that 'however competent, however august, however final, and however authoritative a tribunal may

[judicial law-making] cannot attempt to lay down all the details of the application of the principle on which it is based. It lays down the broad principle and applies it to the case before it. Its elaboration must be left ... to ordinary legislative process or to future judicial decisions disposing of problems as they arise.<sup>139</sup>

Although it should be clear from the above analysis that, on some level at least, international judicial law-making indeed constitutes element of the judicial function, this conclusion should not be overstated, as it places excessive faith in an inchoate international judiciary. There is no conscious, overt coordination between the various courts and tribunals. The various international courts and tribunals remain hobbled, each with its own *Missionbewusstsein*,<sup>140</sup> guarding a set of value judgments embedded within its constitutive instrument. As such, whilst these can constitute valuable contributions to our understanding of international law, the judgments of the various international courts and tribunals should be seen as *evidentiary*, and not *constitutive*, in their essence. It is certainly exciting for some to envisage the prospect of international courts and tribunals breaking the shackles of formalism and articulating the contours of a genuine international community, of speaking truth to power. Yet to do so makes a number of presumptions: it implies a substantive conception of what the law of the international community ought to be, something difficult to discern objectively when most definitions of ‘international community’ are value-laden or so inchoate as to be of little use.<sup>141</sup> Moreover, it is a misplaced faith that international judicial institutions would naturally perpetuate this vision through their law-making contributions; but it is equally possible that courts become handmaidens to the status quo, endlessly reinforcing

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be, it cannot, in the conditions in which its jurisdiction is in law, and in compliance with its decision is in fact, essentially of a voluntary character, dispense with that powerful appeal to opinion which stems from the reasoned content of its pronouncements.’

<sup>139</sup> Lauterpacht, above n 7, 189-90.

<sup>140</sup> M Koskeniemi & P Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, (2002) 15 Leiden Journal of International Law 553, 567, 573.

<sup>141</sup> I have written extensively on the concept of ‘international community’, specifically with reference to the International Court of Justice: see GI Hernández, ‘A Reluctant Guardian? The International Court of Justice and the Concept of “International Community”’ (2012) 83 British Year Book of International Law (forthcoming 2013).

the validity of the system through recourse to arguments of concreteness (validity) and normativity (justice), as per Koskenniemi's oft-quoted, but still apposite, description of international legal argument.<sup>142</sup>

However unsatisfactory this might seem, perhaps judicial institutions respond to a sort of 'societal demand' in exercising a law-creating role, translating social or community interests into general legal concepts, giving 'general and articulate formulation to developments implicit, though as yet clearly accepted, in actual international custom or agreement of States.'<sup>143</sup> International lawyers, working within a conceptually ill-clarified system, have a habit of clinging to whatever authorities can be marshalled in support of an argument, even though specific pronouncement by a judicial institution 'cannot be divorced from the general framework of normative argument in the society within which it operates.'<sup>144</sup> Because judicial pronouncements are structured around these general frameworks, they provide a basis for future development, permitting other international actors to apply the principles so articulated, to clarify them, modify them or opt out from them. It is that normative potential, to *influence* the development of international law, which shapes the law-creating role of judicial institutions: not any formal law-creating authority.

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<sup>142</sup> M Koskenniemi, *From Apology to Utopia* (CUP reissue, CUP, Cambridge 2005), 58, 219.

<sup>143</sup> Lauterpacht, above n 7, 173.

<sup>144</sup> V Lowe, *International Law* (Clarendon, Oxford 2007), 99.